FILED

941 652 APR 5 - 1995

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Sean Chambers,
Larry Closser,

Petitioners,

v.

David L. Pelfrey,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

BETTY D. MONTGOMERY
Ohio Attorney General

SIMON B. KARAS
Counsel of Record
Deputy Chief Counsel
JOHN D. STUBER
Assistant Attorney General
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 644-5401

Attorneys for Petitioners

QUESTION PRESENTED FOR REVIEW

WHETHER AN ISOLATED AND UNAUTHORIZED ASSAULT BY A GUARD UPON A PRISON INMATE CONSTITUTES "PUNISHMENT" WITHIN THE MEANING OF THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

ARGUMENT IN SUPPORT OF CERTIORARI 4

I. THIS COURT HAS RECOGNIZED, BUT NOT RESOLVED, THE ISSUE WHETHER AN ISOLATED AND UNAUTHORIZED ASSAULT BY A PRISON GUARD IS "PUNISHMENT" 4

II. THERE IS A RECOGNIZED CONFLICT IN THE CIRCUIT COURT DECISIONS ON THE ISSUE WHETHER AN ISOLATED AND UNAUTHORIZED ASSAULT BY A PRISON GUARD IS "PUNISHMENT" 10

III. THIS COURT SHOULD DETERMINE THE ISSUE WHETHER AN ISOLATED AND UNAUTHORIZED ASSAULT BY A PRISON GUARD IS "PUNISHMENT" 15

CONCLUSION 18

APPENDIX A-1

TABLE OF AUTHORITIES

CASES — Page(s)

Davis v. Locke, 936 F.2d 1208 (11th Cir. 1991) . 13, 14
Duckworth v. Franzen, 780 F.2d 645
(CA7, 1985), *cert. denied*, 470 U.S. 816,
107 S.Ct. 71, 93 L.Ed.2d 28 (1986) . . . 7, 10, 11
Estelle v. Gamble, 429 U.S. 97 (1976) 9
Farmer v. Brennan, ___ U.S. ___,
114 S. Ct. 1970 (1994) 15
Franklin v. Aycock, 795 F.2d 1253
(6th Cir. 1986) 11
Freitas v. Stone, 818 F. Supp. 1333
(D. Hawaii, 1993) 14
George v. Evans, 633 F.2d 413 (CA 5 1980)10, 11, 12, 14
Graham v. Connor, 490 U.S. 386 (1989) 11, 12, 13
Hirano v. Kakuda, Nos. 92-15076, 92-15091,
92-15854, 92-16398,
1994 U.S. App. LEXIS 8130
(9th Cir., January 18, 1994) 12
Hudson v. McMillian,
503 U.S. ___, 112 S. Ct. 995 (1992) . . . . *passim*
Ingraham v. Wright, 430 U.S. 651 (1977) . . . 4, 7, 8, 9
Johnson v. Glick, 481 F.2d 1028 (2nd Cir.)
cert. denied sub. nom. . . . . . *passim*
John v. Johnston, 414 U.S. 1033,
94 S. Ct. 462, 38 L.Ed. 2d 324 (1973) 6
McRorie v. Shimoda, 795 F.2d 780
(9th Cir. 1986) 13
Moore v. Holbrook, 2 F.3d 697 (6th Cir. 1993) 8
Page v. Johnson, No. CA 92-0957 AH-C,
1993 U.S. Dist. LEXIS 19133
(S.D. Ala., December 22, 1993) 14
Parrish v. Johnson, 800 F.2d 600
(6th Cir. 1986) 8

Pelfrey v. Chambers, 43 F.3d 1034
(6th Cir. 1995) . . . . . *passim*
Rhodes v. Chapman, 452 U.S. 337 (1981) 15
Rodriquez v. Murphy, No. 91-CV-0650E(F),
1994 U.S. Dist. LEXIS 19107
(W.D. N.Y., December 30, 1994) 14
Sampley v. Ruettgers, 704 F.2d 491
(10th Cir. 1983) 11
Weems v. United States, 217 U.S. 349 (1910) 15
Whitley v. Albers, 475 U.S. 312 (1986) . . 4, 6, 9, 11, 14
Wilson v. Seiter,
501 U.S. ___, 111 S. Ct. 2321 (1992) . . 6, 7, 15

MISCELLANEOUS

Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*,
56 Calif. L. Rev. 839 (1989) 15

OPINIONS BELOW

The opinion of the United States Court of Appeals For The Sixth Circuit is reported as *Pelfrey v. Chambers*, 43 F.3d 1034 (6th Cir. 1995), and is printed in the appendix to this petition at A-1. The opinion of dissenting Judge Batchelder is printed at A-9.

The opinion of the district court, titled *Pelfrey v. Chambers*, No. C-2-92-225, United States District Court for the Southern District of Ohio, Eastern Division, is not reported and is printed in the appendix to this petition at A-18. The separate judgement of the district court is reprinted in the appendix at A-16.

JURISDICTION

The opinion of the United States Court of Appeals For The Sixth Circuit is dated January 5, 1995. (A-1). No petition for rehearing was filed. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment 8

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

This case squarely presents the issue of whether a private assault by a prison guard against an inmate is always "punishment", thus implicating the Eighth Amendment prohibition against cruel and unusual punishment.

Respondent, David Pelfrey, an inmate, filed his complaint in district court, against petitioners, prison guards, Sean Chambers and Larry Closser, alleging the following:

> On Jan. 2, 1992, after returning from my job assignment, I went to the Upstairs Office at the London Correctional Camp, where I reside, to obtain my mail. Correction Officers (and Defendants) Chambers and Closser were in the office. I asked Officer Closser for my mail. I was responding to a question from Officer Closser when he started walking around from where he had been standing behind the desk. He (Officer Closser) pulled out his knife as he walked towards me. When he got within reach of me, Officer Closser put one hand on my shoulder and the other one on top of my head. I instinctively put my hands on top of my head, and at that time, Officer Chambers pulled his knife out and grabbed my hands, forcing them down to my side. Officer Closser then proceeded to cut my hair with his knife. After cutting off a great portion of my hair, Officer Chambers then let me go, and he (Officer Chambers) stood there grinning and smiling, while officer Closser was laughing and dropping my hair on the floor.

Pelfrey's complaint solely alleged a violation of the Eighth Amendment. Although the complaint itself did not allege a jurisdictional basis, the parties and the district court proceeded on the basis such a claim was brought pursuant to 42 U.S.C. §1983.

Petitioners' answer to the complaint denied the factual allegations of the complaint, including any cutting of Pelfrey's hair and raised further defenses of failure to state a claim and that Pelfrey's claim did not rise to the level of a violation of the Eighth Amendment. In a subsequent motion for judgment on the pleadings, petitioners specifically asserted that the alleged unprovoked assault was not "punishment" within the terms of the Eighth Amendment.

The district court agreed. In granting the petitioners' motion for judgment on the pleadings, the court stated:

> a spontaneous, isolated assault by a prison guard on an inmate is not punishment within the Eighth Amendment.

(A-23).

Upon appeal the Sixth Circuit below, by 2-1 vote, disagreed. The Court held:

> We categorically reject defendants' argument that "an unprovoked attack is not punishment."

Pelfrey, 43 F.3d at 1037. (A-7). Judge Batchelder dissented:

> Even if Chambers and Closser cut Pelfrey's hair, their actions, while inexcusable, are

> outside the scope of "punishment" prohibited by the Eighth Amendment.

Id. at 1039. (A-12).

Petitioners have filed a timely petition for writ of certiorari from the decision of the Sixth Circuit below.

ARGUMENT IN SUPPORT OF CERTIORARI

I. THIS COURT HAS RECOGNIZED, BUT NOT RESOLVED, THE ISSUE WHETHER AN ISOLATED AND UNAUTHORIZED ASSAULT BY A PRISON GUARD IS "PUNISHMENT".

In *Hudson v. McMillian*, 503 U.S. ___, 112 S. Ct. 995 (1992), this Court reiterated the standard for determining a violation of cruel and unusual punishment: "the unnecessary and wanton infliction of pain". 112 S. Ct. at 998, (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1986)) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)). Thus, in *Hudson*, the Court found that cruel and unusual punishment could exist, even if no serious injury resulted, because the clause was aimed at infliction of "pain" itself:

> This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.

Hudson, 112 S. Ct. at 1000.

But in resolving the above issue, the Court also noted a different issue which it did not decide - the issue presented by this petition:

> Respondents argue that, aside from the significant injury test applied by the Fifth Circuit, their conduct cannot constitute an Eighth Amendment violation, because it was "isolated and unauthorized". . . . The beating of Hudson, they contend, arose from a "personal dispute between correctional security officers and a prisoner" and was against prison policy.
>
> * * * *
>
> We take no position on respondents' legal argument because we find it inappposite on this record. The Court of Appeals left intact the Magistrate's determination that the violence at issue in this case was not "an isolated assault."

Id. at 1001.

In contrast, in this case, "Pelfrey does not claim that this assault was anything other than an isolated incident; neither does he claim that the use of force was authorized or condoned by defendants' supervisors. Further, Pelfrey does not claim that there was a penal or disciplinary purpose for the haircut or that this was anything other than a spontaneous isolated assault." *Pelfrey*, 43 F.3d at 1039. (A-12).

While the Court has often dealt with "cruel and unusual punishment," it has not often dealt with the concept and definition of punishment itself. The issue is significant,

however, because if "punishment" does not exist, then there obviously cannot be a violation of the cruel and unusual punishment clause.

Punishment requires that an action be "deliberately administered for a penal or disciplinary purpose." *Wilson v. Seiter,* 501 U.S. ___, 111 S. Ct. 2321, 2325 (1992), quoting *Johnson v. Glick,* 481 F.2d 1028, 1032 (2nd Cir.), *cert. denied sub. nom. John v. Johnston*, 414 U.S. 1033, 94 S. Ct. 462, 38 L.Ed. 2d 324 (1973). ("The thread common to all [Eighth Amendment prison cases] is that 'punishment' has been deliberately administered for a penal or disciplinary purpose").

Cruel and unusual punishment arises from a misuse of those purposes. In *Whitley*, the Court analyzed whether a claim of excessive force in quelling a prison riot amounted to cruel and unusual punishment. The question of whether "punishment" existed was not presented, since the use of force eminated from the exercise of a legitimate penological purpose-the supression of the riot. Similarly, in *Hudson*, the issue of "punishment" was not discussed, since the alleged beating there occurred as officers transported Hudson to administrative lockdown. But the Court has never held that all uses of force are "punishment", nor that the concept is to be separated from the penal or disciplinary purposes which justify the imposition and execution of a sentence.

In *Wilson*, the Court quoted Judge Posner:

> "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . [I]f [a] guard

> accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.' *Duckworth v. Franzen*, 780 F.2d 645, 652 (CA7, 1985), *cert. denied*, 470 U.S. 816, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986).

Wilson, 111 S. Ct. at 2325. An isolated, unauthorized and personal assault of one individual by another is not "punishment." Such an assault does not chastise, deter or arise from any purpose contemplated by the State's imposition of sentence. Rather it arises from personal animosity alone - a reason wholly unconnected with service of the inmate's sentence.

Johnson v. Glick has often been cited by the Court for basic principles of Eighth Amendment law. Thus, for example, in *Ingraham v. Wright*, the Court cited *Glick* for the proposition that an Eighth Amendment inquiry is not limited to just the imposition of sentence, but how that sentence may be carried out.

> Judge Friendly similarly has observed that the Cruel and Unusual Punishments Clause "can fairly be deemed to be applicable . . . to cover conditions of confinement which may make intolerable an otherwise constitutional term of imprisonment."

430 U.S. at 669, n. 38 (quoting *Glick*, 481 F.2d at 1032). It is thus even more significant that *Glick* is the genesis of the argument that isolated and unauthorized assaults are not punishment. "Although a spontaneous attack by a guard is 'cruel' and, we hope, 'unusual,' it does not fit any ordinary concept of punishment". *Glick*, 481 F.2d at 1032.

In *Hudson*, the Court noted that not every malevolent touch by a prison guard gives rise to a federal cause of action. 112 S. Ct. at 1000 (citing *Glick*, 481 F.2d at 1033 ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights")). The Sixth Circuit below construed the Court's Eighth Amendment jurisprudence as requiring a constitutional violation in any situation in which the wanton infliction of pain results:

> Although the maintenance of prison security and discipline may often require that prisoners be subjected to physical contact which at common law would be an assault, *see Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986), a violation of the Eighth Amendment will nevertheless occur if "the offending conduct [ ] reflect[s] an 'unnecessary and wanton infliction of pain'" *Moore v. Holbrook*, 2 F.3d 697, 700 (6th Cir. 1993) (quoting *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977) (other citations omitted).

Pelfrey, 43 F.3d at 1037. (A-6). If this is so, however, every malevolent touch apparently would implicate the Eighth Amendment, for the unnecessary and wanton

infliction of pain would be found in the malevolence of the guard.

Other cases from the Court have not addressed the question presented here. *Whitley v. Albers* arose in the context of an inmate being shot by a guard in the process of restoring order during a prison riot. The use of force in that situation was not isolated nor unauthorized. Moreover, *Whitley* preceded *Hudson v. McMillian* by several years. If *Whitley* had decided the question, there would have been no reason to view it as open in *Hudson*.

Similarly, *Estelle v. Gamble*, 429 U.S. 97 (1976), does not speak to the question presented. The provision of needed medical services is a direct consequence of the incarceration of a prisoner, so withholding those services would be considered an increase of the sentence. In contrast, the unauthorized, isolated, and personal assault by an individual guard against an individual inmate, while deplorable, is in no sense connected with the sentence. Thus, while such an act may be a tort, it is not "punishment".

The opinion of Justice White in *Ingraham v. Wright* sheds light on what constitutes punishment. Disagreeing with the majority of the Court that the Eighth Amendment was applicable only in the criminal law context, Justice White argued that corporal punishment of school children was "punishment":

> Like other forms of punishment, spanking of school children involves an institutionalized response to the violation of some official rule or regulation proscribing certain conduct and is imposed for the purpose of rehabilitating the offender and others like him from

> committing the violation in the future, and inflicting some measure of social retribution for the harm that has been done.

430 U.S. at 685-686, (White, J., dissenting.). Applying this definition of punishment into the prison context, a personal assault would not be "punishment". Such an assault is neither an "institutionalized response" seeking future deterrence, nor "retribution" for past harms.

II. THERE IS A RECOGNIZED CONFLICT IN THE CIRCUIT COURT DECISIONS ON THE ISSUE WHETHER AN ISOLATED AND UNAUTHORIZED ASSAULT BY A PRISON GUARD IS "PUNISHMENT".

A significant conflict currently exists between the circuits regarding the definition of punishment as contemplated by the Eighth Amendment. In *Hudson*, the Court itself referenced the conflict on this unresolved issue:

> *George v. Evans*, 633 F.2d 413, 416 (CA 5 1980) ("[A] single unauthorized assault by a guard does not constitute cruel and unusual punishment . . ."). But *see Duckworth v. Franzen*, 780 F.2d 645, 652 (CA 7 1985) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment . . ."), *cert. denied*, 479 U.S. 816 (1986).

112 S. Ct. at 1001.

The Sixth Circuit, while plainly acknowledging that such a conflict existed, viewed the conflict as resolved by

later decisions of the Court. While the Second Circuit in *Johnson v. Glick*, a pretrial confinement situation, and the Fifth Circuit in *George v. Evans*, a post trial incarceration situation, both held that isolated and unauthorized assaults are not punishment under the Eighth Amendment, both Circuits also found that an independent due process violation would protect against the use of undue force by a prison guard, even in situations which were not "punishment". Thus, according to the Sixth Circuit, the conflict with the Seventh Circuit in *Duckworth* was not how the Circuits resolved the issue of what constitutes punishment, but rather on the issue "whether the Eighth Amendment's proscription against 'excessive force' was coextensive with the Fourteenth Amendment's protection against deprivations of liberty". *Pelfrey*, 43 F.3d at 1036. (A-4). *See also Sampley v. Ruettgers*, 704 F.2d 491, 494-5 (10th Cir. 1983); *Franklin v. Aycock*, 795 F.2d 1253 (6th Cir. 1986).

In *Graham v. Connor*, 490 U.S. 386 (1989), the Court intimated that after conviction the Eighth Amendment and the Fourteenth Amendment were coextensive:

> After conviction, the Eighth Amendment "serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified." Any protection that "substantive due process" affords convicted prisoners against excessive force is, we have held at best redundant of that provided by the Eighth Amendment.

490 U.S. at 395 n.10 (quoting *Whitley*, 475 U.S. at 327). Relying on *Graham*, the Sixth Circuit concluded that the courts in *Johnson v. Glick* and *George v. Evans* would now incorporate their prior due process holdings into the Eighth

Amendment, thereby altering their prior Eighth Amendment holdings. Hence, in the Sixth Circuit's view, the conflict is resolved.

The problem with this supposition, however, is that *Johnson v. Glick* and *George v. Evans* have not been vacated, reversed, or abandoned. In fact, as noted, the Court has continued to favorably cite *Johnson v. Glick* for its Eighth Amendment holdings even after *Graham* was decided. *See Hudson*. As stated by Judge Batchelder in dissent:

> I respectfully disagree however, with the majority's pronouncement that *Glick* and *Evans* are dead.

Pelfrey, 43 F.2d at 1039. (A-12).[1]

Other Circuits also have recognized that a conflict still exists. The Ninth Circuit has consistently held that an isolated and unauthorized assault is punishment under the Eighth Amendment. In *Hirano v. Kakuda*, Nos. 92-15076, 92-15091, 92-15854, 92-16398, 1994 U.S. App. LEXIS 8130, at * 5 (9th Cir., January 18, 1994) (copies supplied to Clerk), the Ninth Circuit stated:

---

[1] As noted by Judge Batchelder, the Sixth Circuit majority's retroactive incorporation of *Glick* and *Evans'* due process analysis into an Eighth Amendment analysis is curious. If, prior to *Graham*, an isolated, spontaneous incident was not "punishment" under the Eighth Amendment, such an incident would not become punishment upon the Court's rejection of the argument that a more liberal due process standard should also be applied. If such an incident were not "punishment" before *Graham*, it would not become punishment after *Graham*.

> Finally, relying on *Johnson v. Glick*, 481 F.2d 1028, 1032 (2nd Cir. 1973), Kakuda contends that his confrontation with Hirano was an "isolated attack" not constituting "punishment" under the Eighth Amendment. We rejected a similar argument in *McRorie v. Shimoda*, 795 F.2d 780, 782-84 (9th Cir. 1986). The Supreme Court's refusal to take a position on the existence of such an exception in *Hudson* does not change the fact that no such exception is recognized in this circuit.

The Eleventh Circuit, on the other hand, has recently reaffirmed its belief that *Johnson v. Glick, supra*, was correctly decided. In *Davis v. Locke*, 936 F.2d 1208 (11th Cir. 1991), the Court agreed with *Glick* that there is an Eighth Amendment exception for isolated and unauthorized assaults Significantly, however, the Court then found liability on a separate due process basis. Since *Davis v. Locke*, was decided after *Graham v. Connor*, it appears that the lower courts are still debating whether an isolated incident is "punishment", even if they may agree that a claim of constitutional dimension is otherwise stated.[2] Petitioners, of course, assert that no constitutional claim is stated at all. Since the sole constitutional protection against excessive force after conviction is the Eighth Amendment, and since an isolated and unauthorized assault is not "punishment," then only a state tort law, not constitutional claim, is asserted.

---

[2] Even if a separate due process claim otherwise exists, it would be of no benefit to Pelfrey. As noted, Pelfrey only raised a claim under the Eighth Amendment.

Various district courts also have disagreed on the issue. In *Rodriquez v. Murphy*, No. 91-CV-0650E(F), 1994 U.S. Dist. LEXIS 19107 (W.D. N.Y., December 30, 1994) (copies supplied to Clerk), the court noted the isolated nature of the alleged assault as a factor supporting a finding that there was no wanton infliction of pain. Similarly in *Page v. Johnson*, No. CA 92-0957 AH-C, 1993 U.S. Dist. LEXIS 19133 (S.D. Ala., December 22, 1993), (copies supplied to Clerk), the court relied, in granting summary judgment, upon the fact that "an isolated assault by an individual guard on an inmate is not, within the meaning of the eighth amendment, punishment." *Id.* at *5 (citing *Davis v. Locke*, 936 F.2d 1208, 1212 (11th Cir. 1991) (quoting *George v. Evans*, 633 F.2d 413, 415 (5th Cir. 1980)). More significantly, the court stated:

> Although the Supreme Court has noted a split in the Circuits as to the viability of this theory for dismissing an Eighth Amendment excessive force claim, it has not decided the issue.

Id. at *5.

In contrast, in *Freitas v. Stone*, 818 F. Supp. 1333 (D. Hawaii, 1993), the court rejected the isolated assault exception, adopting a view similar to the Sixth Circuit that *Johnson v. Glick* would now be decided differently. "If it is indeed the case, as defendants say it must be, that *Whitley* requires Fourteenth and Eighth Amendment liability to be coextensive in all instances, the court finds it more likely that Judge Friendly's definition of 'punishment' in *Johnson v. Glick* was overly narrow than, . . . that the entire class of one time unjustified uses of force by prison officials is not constitutionally actionable." 818 F. Supp. at 1340 n. 6.

III. THIS COURT SHOULD DETERMINE THE ISSUE WHETHER AN ISOLATED AND UNAUTHORIZED ASSAULT BY A PRISON GUARD IS "PUNISHMENT".

The Court itself, on numerous occasions, has noted that its Eighth Amendment jurisprudence has evolved far from the original understanding of the Clause. *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Weems v. United States*, 217 U.S. 349 (1910). *See also:* Granucci, *"Nor Cruel And Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839 (1969). The question in this case is whether such jurisprudence has evolved to a point that every intentional tort committed by a guard against a prisoner is equated with a violation ,of the Cruel and Unusual Punishments Clause.

Certainly, that is the thrust of the Sixth Circuit's opinion. The "objective" requirement of *Wilson v. Seiter* for an Eighth Amendment violation is met because the assault is facilitated by the "power arrangement(s)" that exist in a prison setting. *Pelfrey*, 43 F.3d at 1037. (A-7). And, of course, an intentional act, as is involved in an assault, would meet any of the various subjective requirements that have been imposed by the Court in its Eighth Amendment jurisprudence. *Farmer v. Brennan*, ___ U.S. ___, 114 S. Ct. 1970 (1994). Yet such an analysis would equally be applicable to other intentional torts, and would require the federal judiciary to adjudicate claims which formerly were relegated to the state courts to resolve.

In *Hudson v. McMillian*, Justices Thomas and Scalia in dissent posed the question as follows:

> Today's expansion of the Cruel and Unusual Punishment Clause beyond all bounds of

> history and precedent is, I suspect yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society. Abusive behavior by prison guards is deplorable conduct that properly evokes outrage and contempt. But that does not mean that it is invariably unconstitutional. The Eighth Amendment is not, and, should not be turned into, a National Code of Prison Regulation. . . . Rather, . . . primary responsibility for preventing and punishing such conduct rests *not* with the Federal Constitution but with the laws and regulations of the various States.

112 S. Ct. at 1010 (Thomas, J., dissenting; joined by Scalia, J.) Such a view is equally applicable to the issue whether the events in this case constitute "punishment" at all, much less cruel and unusual punishment.

Ohio has an extensive system for the resolution of tort claims. In most instances, the State may be sued for the actions of its employees in the Ohio Court of Claims. And, when the State may not otherwise be sued, because the employee's actions are not attributable to the State, the employee may be sued individually. Thus, there is little risk that claims of assault of an inmate by a guard will go uncompensated, if such claim is not viewed as the constitutional equivalent of "punishment".

Of course, petitioners do not argue that an otherwise constitutional claim should not be heard by the federal courts simply because of the availability of alternative remedies in tort. But by the same token, the Eighth Amendment definition of "punishment" need not be stretched so that

personal actions by a guard totally unrelated to the service of a sentence are now constitutional claims, rather than torts.

The Sixth Circuit below rejected this view, stating:

> To hold otherwise would . . . lead to the anomalous result in which a prisoner who is assaulted after having provoked a guard can state a cognizable claim for a constitutional violation while his cellmate who is assaulted *for absolutely no reason* is afforded only that relief permitted by state law.

43 F.2d at 1037. (A-7). But that reasoning proceeds backwards. "Surely prison was not a more congenial place in the early years of the Republic than it is today; nor were our judges and commentators so naive as to be unaware of the often harsh conditions of prison life. Rather, they simply did not conceive of the Eighth Amendment protecting inmates from harsh treatment." 112 S. Ct. at 1005 (Thomas, J., dissenting, joined by Scalia J.). That the Court has extended constitutional protection to what would be viewed as "punishment" in the prison context, i.e., the carrying out of the sentencing, hardly leads to the conclusion that such protection should equally be afforded to what is not "punishment" at all.

In *Hudson*, two members of the Court stated, "the Court leaves open the issue whether isolated and unauthorized acts are 'punishment' at all. This will, of course, be the critical question in future cases of this type." 112 S. Ct. at 1007 n. 2 (Thomas, J. dissenting, joined by

Scalia J.). The issue is squarely presented in this case and should be decided now.

CONCLUSION

Wherefore, for the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

BETTY D. MONTGOMERY
Ohio Attorney General

SIMON B. KARAS
Counsel of Record
Deputy Chief Counsel
JOHN D. STUBER
Assistant Attorney General
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 644-5401
Attorneys for Petitioners

April 5, 1995

No. 93-3278

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID L. PELFREY,

Plaintiff-Appellant,

v.

SEAN CHAMBERS; LARRY CLOSSER, Correction Officers, Individually and in their Official Capacities,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

---

Decided and Filed January 5, 1995

Before: JONES and BATCHELDER, Circuit Judges; and GILMORE, District Judge.*

---

*The Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

GILMORE, D. J., delivered the opinion of the court, in which Jones, J., joined. BATCHELDER, J. (pp. 9-13), delivered a separate dissenting opinion.

This case presents the question of whether the isolated and unauthorized use of force by a prison guard on an inmate constitutes "punishment" within the meaning of the Eighth Amendment. The district court concluded that a spontaneous assault does not state a cognizable claim under the Eighth Amendment. For the reasons set forth below, we reverse.

I

Appellant David L. Pelfrey filed this action under 42 U.S.C. § 1983. In his complaint, Mr. Pelfrey alleged that on January 2, 1992, while incarcerated at the London Correctional Institution (LCI), he was assaulted by correctional officers Sean Chambers and Larry Closser. Pelfrey's complaint set forth the following facts in support of his request for damages and injunctive relief:

> On January 2, 1992, after returning from my job assignment, I went to the Upstairs Office at the London Correctional Camp . . . to obtain my mail. Correction Officers (and Defendants) Chambers and Closser were in the office. I asked Officer Closser for my mail. I was responding to a question from Officer Closser when he started walking around from where he had been standing behind the desk. He (Officer Closser) pulled out his knife as he walked toward me. When he got within reach of me, Officer Closser put one hand on my shoulder and the other one on top of my head. I instinctively put my hands on top of my head, and at that time, Officer

> Chambers pulled his knife out and grabbed my hands, forcing them down to my side. Officer Closser then proceeded to cut my hair with his knife. After cutting off a great portion of my hair, Officer Chambers then let me go, and he (Officer Chambers) stood there grinning and smiling, while Officer Closser was laughing and dropping my hair on the floor. These officers had me scared, intimidated, and threatened.

(J.A. at 7).

After the incident, Mr. Pelfrey filed an Informal Grievance and contacted both the Institution Inspector and the Warden. A "use of force" committee was appointed, and after an investigation, both correctional officers were given four days of administrative leave.

Shortly thereafter, Mr. Pelfrey filed the complaint that is the subject of this appeal, in which he alleged that Officers Chambers and Closser had inflicted cruel and inhumane punishment on him in violation of the Eighth Amendment. Pelfrey's complaint sought money damages and further requested that the defendant officers either forfeit their jobs or be required to undergo treatment for their "abusive behavior."

Defendants Chambers and Closser filed a Motion for Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c). The defendants asserted that Mr. Pelfrey's complaint did not state a cognizable claim because, even accepting his factual allegations as true, the complaint stated, at most, a claim for common law assault rather than a violation of the Eighth Amendment's proscription against cruel and unusual punishment. The defendants argued that, even if they had

cut off Mr. Pelfrey's hair without provocation or justification, their actions did not constitute "punishment" because it was not administered for penological or disciplinary purposes.

The district court issued an Opinion and Order, granting defendants' Motion for Judgment on the Pleadings. The court held that Mr. Pelfrey's complaint failed to state a cause of action arising under § 1983 because "a spontaneous, isolated assault by a prison guard on an inmate is not punishment within the Eighth Amendment." The court further held that, in order for an action to constitute punishment, it must be imposed for penal or disciplinary purposes.

In reaching its conclusion, the district court relied on the Second Circuit's decision in *Johnson v. Glick*, 481 F.2d 1028 (2nd Cir.), *cert. denied*, 414 U.S. 1033 (1973) and the Fifth Circuit's decision in *George v. Evans*, 633 F.2d 413 (5th Cir. 1980). However, we believe these cases are inapposite given the slate on which we currently write.

II

When *Johnson v. Glick* and *George v. Evans* were decided, the circuits were split on the issue of whether the Eighth Amendment's proscription against "excessive force" was coextensive with the Fourteenth Amendment's protection against deprivations of liberty. The Second and Fifth Circuits resolved the issue by holding that a spontaneous, unauthorized assault on a prisoner by a prison guard was cognizable under the Fourteenth Amendment rather than the Eighth Amendment. Significantly, neither circuit intended to deprive prisoners of a federal forum and a federal remedy when prison officials are charged with the intentional use of excessive force. *See Johnson v. Glick*, 481 F.2d at 1032

("constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment"; "application of undue force by law enforcement officers deprives a suspect of liberty without due process of law") *and George v. Evans*, 633 F.2d at 416 ("[w]hether or not an Eighth Amendment violation can be established, the use of undue force by a prison guard is actionable as a deprivation of Fourteenth Amendment due process rights").

In 1989, the Supreme Court, in an often cited footnote, suggested that all post-conviction excessive force claims were to be raised under the Eighth Amendment rather than the Fourteenth Amendment:

> [T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment. After conviction, the Eighth Amendment "serves as the primary source of substantive protection ... in cases ... where the deliberate use of force is challenged as excessive and unjustified." Any protection that "substantive due process" affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment.

Graham v. Connor, 490 U.S. 386, 395, n.10 (1989), (quoting *Whitley v. Albers*, 475 U.S. 312, 327 (1979)).

Following the Supreme Court's directive, this circuit recently held that all post-conviction excessive force claims are to be raised "exclusively under the Eighth Amendment's cruel and unusual punishment clause." *Cornwell v. Dahlberg*, 963 F.2d 912, 915 (6th Cir. 1992). Accordingly, based on the legal landscape in which we currently write, we

reject the district court's reliance on *Johnson v. Glick* and *George v. Evans.*

III

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive Bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

In *Hudson v. McMillian*, ___ U.S. ___, 112 S. Ct. 995, 117 L.Ed.2d 156 (1992), the Supreme Court clarified the standard to be used in analyzing "excessive force" claims under the Eighth Amendment:

> [W]henever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley v. Albers*, 475 U.S. 312 (1986)]: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

Id. at 999, 117 L.Ed.2d at 165-66.

Although the maintenance of prison security and discipline may often require that prisoners be subjected to physical contact which at common law would be actionable as an assault, *see Parrish v. Johnson*, 800 F.2d 600 (6th Cir. 1986), a violation of the Eighth Amendment will nevertheless occur if "the offending conduct [ ] reflect[s] an 'unnecessary and wanton infliction of pain.'" *Moore v. Holbrook*, 2 F.3d 697, 700 (6th Cir. 1993) (quoting *Ingraham v. Wright*, 430

U.S. 651 (1977) (other citations omitted). *Accord Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985) ("If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment . . . .")

In this case, defendants have not asserted that the assault on Pelfrey occurred as a result of a "good-faith effort to maintain or restore discipline." Nor can it be said that defendants' conduct furthered any other legitimate penological or institutional objective. Instead, it would certainly appear that defendants' actions (assuming *arguendo* that defendants committed the acts alleged in plaintiff's complaint) were designed to frighten and degrade Pelfrey by reinforcing the fact that his continued well-being was entirely dependent on the good humor of his armed guards. To us, given the closed nature of the prison environment, this constitutes a totally unwarranted, malicious and sadistic use of force to cause harm. *See Parrish*, 800 F.2d at 605 (waving of a knife in petitioner's face, knife-point extortion of potato chips and cookies, incessant taunting, and failure to relay petitioner's requests for medical care "are all unnecessary acts which result in pain being inflicted").

We categorically reject defendants' argument that "an unprovoked attack is not punishment." To hold otherwise would ignore the power arrangements that exist within the prison environment and lead to the anomalous result in which a prisoner who is assaulted after having provoked a guard can state a cognizable claim for a constitutional violation while his cellmate who is assaulted *for absolutely no reason* is afforded only that relief permitted by state law. Such a result is devoid of all logic and flies in the face of this Court's previous statement that "the motivation of an assault" is relevant to the question of "whether the measure taken

inflicted unnecessary and wanton pain." *Moore v. Holbrook*, 2 F.3d at 700.

For the foregoing reasons, we believe that Plaintiff Pelfrey has stated a cognizable claim under § 1983 for a violation of the Eighth Amendment.

IV

In the court below and on appeal, defendants argued that plaintiff's complaint should be dismissed, at least insofar as it sought money damages, because "Pelfrey did not specify that he was suing the defendant correctional officers in their individual capacities."[1] *See Wells v. Brown*, 891 F.2d 591 (6th Cir. 1989).

In *Wells*, this Court held that inmates seeking damages under § 1983 were required to set forth clearly in their pleadings that they were suing state officials in their individual capacities rather than in their capacities as state officials. *Id.* at 593-594. The rationale behind this requirement was to afford state officials sufficient notice of the fact that they could be held personally liable for the payment of any damage award obtained by the plaintiff. *Id.* Absent specific notice, the court held that it would construe an ambiguous complaint as a complaint against the officers in their official capacities. *Id.*

---

[1] Of course, even if defendants' arguments were well-taken, that would not provide an alternative basis for dismissing petitioner's complaint. To the extent that Pelfrey's complaint also seeks injunctive relief for the actions of the correctional officers, that portion of his complaint would survive an Eleventh Amendment challenge.

The instant case can and should be distinguished from *Wells*. Although Mr. Pelfrey's complaint did not specify whether the defendants were being sued in their individual or official capacities, one month after the complaint was filed, Mr. Pelfrey filed a motion to bar the Ohio Attorney General from representing the defendants. In his motion, Mr. Pelfrey specifically stated that the defendants acted outside the scope of their employment and in bad faith when they cut his hair. Based on this pleading, we believe that defendants were given sufficient notice of the fact that they were being sued in their individual capacity. Moreover, as plaintiff's case was dismissed at an early stage of the proceedings, any failure to specify capacity is a flaw subject to amendment upon remand. *See generally* Fed. R. Civ. P. 15(A) (allowing liberal leave to amend "when justice so requires"). Accordingly, we reverse the decision of the district court and remand this case for proceedings not inconsistent with this opinion.

ALICE M. BATCHELDER, Circuit Judge, dissenting. Although I accept the majority's reasoning in Part IV of its opinion that the defendants were given sufficient notice of the fact that they were being sued in their individual capacity, and I therefore concur in that conclusion, I disagree with the majority's determination that the district court improperly granted defendants' motion for judgment on the pleadings on the Eighth Amendment claim. Therefore, I respectfully dissent.

Pelfrey's first argument on appeal is that the behavior of defendants violated the Eighth Amendment's prohibition against cruel and unusual punishment. The district court considered Pelfrey's claim pursuant to defendants' Rule 12(c) motion for judgment on the pleadings. Fed. R. Civ. P. 12(c). In considering this motion, the district court must accept all the factual allegations as true. *Beal v. Missouri*

Pac. R.R. Corp., 312 U.S. 45, 51 (1941). After consideration of the applicable law, the district court granted the motion.

The standard of review for a judgment on the pleadings under Rule 12(c) is the same as that under Fed. R. Civ. P. 12(b)(6). *See Morgan v. Church's Fried Chicken*, 829 F.2d 10, 11 (6th Cir. 1987). Whether the district court correctly dismissed the suit at the pleadings stage is a question of law subject to de novo review. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir. 1993). After a careful de novo review of the record, I believe that the district court did not err in granting the defendants' motion.

In *Hudson v. McMillian*, 112 S. Ct. 995 (1992), the Supreme Court set out the standard to apply when prison officials are accused of using excessive physical force in violation of the Eighth Amendment: "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Id.* at 996. Pelfrey contends that in cutting his hair, the defendants acted maliciously and sadistically to cause harm.

The district court, in rejecting Pelfrey's argument, noted that in *McMillian*, the Court tempered this broad standard stating: "[t]hat is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action." *Id.* at 1000 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir.) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights"), *cert. denied*, 414 U.S. 1033 (1973)). The district court went on to focus on whether the guards' actions constituted "punishment" under the Eighth Amendment.

The district court stated:

> Punishment is an action by prison guards or a condition of confinement applied to an inmate for a penal or disciplinary purpose and authorized by high level prison officials. *George v. Evans*, 620 F.2d 495 (5th Cir. 1980). A spontaneous, isolated assault by a prison guard on an inmate is not punishment within the Eighth Amendment. *Id.* at 497; *Johnson v. Glick*, 481 F.2d at 1032. ("[A]ltough a spontaneous attack by a guard is 'cruel' and, we hope, 'unusual,' it does not fit any ordinary concept of 'punishment.'").

Pelfrey v. Chambers, No. C-2-92-225, slip op. at 5 (S.D. Ohio Feb. 8, 1993).

The Supreme Court explicitly refused to address the "punishment" argument in *McMillian*. Citing *Glick* and *George v. Evans*, 620 F.2d 495 (5th Cir. 1980), the *McMillian* Court noted that circuit courts had found similar uses of force to be beyond the scope of "punishment" prohibited by the Eighth Amendment. However, the Court found this argument was "inapposite" to the facts of *McMillian*, since the violence at issue in *McMillian* was "not an isolated assault," the question of whether the acts were unauthorized was not before the Court, and the supervisor had "'expressly condoned the use of force in this instance.'" *McMillian*, 112 S. Ct. at 1001-02 (quoting the Magistrate's finding).

Unlike the plaintiff in *McMillian*, Pelfrey does not claim that this assault was anything other than an isolated incident; neither does he claim that the use of force was authorized or condoned by defendants' supervisors. Further,

Pelfrey does not claim that there was a penal or disciplinary purpose for the haircut or that this was anything other than a spontaneous isolated assault. *See Glick*, 481 F.2d at 1032; *Evans*, 633 F.2d 413, 415.[2] Rather, he claims solely that the assault was an isolated, malicious act by the defendants.

While the punishment issue has not been directly addressed by the Supreme Court, the reasoning of the district court and the holdings of the Fifth Circuit in *Evans* and the Second Circuit in *Glick* are persuasive. A hair cut would not ordinarily be considered a punishment and, in this case, it is clear from the facts as stated by Pelfrey, that this haircut was an isolated and unauthorized assault upon him. Even if Chambers and Closser cut Pelfrey's hair, their actions, while inexcusable, are outside the scope of "punishment" prohibited by the Eighth Amendment.

I therefore disagree with the majority that Pelfrey has stated an Eighth Amendment claim. In its opinion the majority summarily "rejects" the district court's reliance on *Johnson v. Glick* and *George v. Evans* because of a perceived change in the legal landscape of Eighth Amendment jurisprudence. I respectfully disagree, however, with the majority's pronouncement that *Glick* and *Evans* are dead. Contrary to the majority opinion, both this Court and the U.S. Supreme court have continuously relied upon *Glick* in analyzing allegations of cruel and unusual punishment. *See Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992); *Wilson v. Seiter*, 501 U.S. 294, 300 (1991); *Whitley v. Albers*, 475

---

[2] *Evans* was initially withdrawn and then re-released. The pertinent language is retained in the subsequent opinion of the Fifth Circuit. *George v. Evans*, 633 F.2d 413 (5th Cir. 1980).

U.S. 312, 320 (1986); *Moore v. Holbrook*, 2 F.3d 697, 700 (6th Cir. 1993); *Williams v. Browman*, 981 F.2d 901, 905 (6th Cir. 1992); *Branham v. City of Dearborn Heights*, 830 F. Supp. 399, 401 (E.D. Mich. 1993); *Jabbar-El v. Sullivan*, 811 F. Supp. 265, 273 (E.D. Mich. 1992). Furthermore, both *Glick* and *Evans* are cited favorably by the Supreme Court in *Hudson v. McMillian* which set the standard to apply when considering Eighth Amendment claims of excessive force. *See McMillian*, 112 S. Ct. at 998, 1000, and 1001.

In *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989), the Court clarified the principle that post-conviction excessive force claims are properly raised pursuant to the Eighth Amendment rather than the Fourteenth Amendment. According to the majority's analysis, *Glick* and *Evans*, both decided before *Graham v. Connor*, are not to be relied upon now because they led the Second and Fifth Circuits, respectively, to recognize claims of excessive force under the Fourteenth Amendment rather than the Eighth Amendment. The majority's reading of *Glick* and *Evans* is curious. In *Glick*, the Second Circuit first analyzed the prisoner's excessive force claim under the Eighth Amendment. Pursuant to its analysis, the *Glick* court rejected the prisoner's claim on Eighth amendment grounds "express[ing] doubt whether a 'spontaneous attack' by a prison guard, done without the authorization of prison officials, fell within the traditional Eighth Amendment definition of 'punishments.'" *Graham v. Connor*, 490 U.S. at 393 n.6 (citing *Glick*, 481 F.2d at 1032). Having concluded that the claim was not cognizable under the Eighth Amendment, the *Glick* court went on to consider the claim under a substantive due process analysis. At the very least, the *Glick* court applied a broader constitutional standard under a general due process analysis and still found that an isolated, spontaneous incident

does not violate a prisoner's constitutional rights. *Glick*, 481 F.2d at 1033.

Likewise, the *Evans* court could not have relied upon the Eighth Amendment more explicitly than it did when it stated: "An isolated assault by an individual guard on an inmate is not, within the meaning of the eighth amendment [sic], punishment." *Evans*, 633 F.2d at 415-16 (citing *Glick*, 481 F.2d at 1032).

The majority cites *Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992) as significant for its holding that post-conviction excessive force claims are properly raised exclusively pursuant to the Eighth Amendment. However, seven months after this Court's decision in *Cornwell*, we again relied upon *Glick* in our decision in *Williams v. Browman*, 981 F.2d 901 (6th Cir. 1992). In *Williams*, this Court affirmed the district court which had specifically relied upon *Glick* in dismissing a prisoner's claim for relief on Eighth Amendment grounds. *Williams*, 981 F.2d at 905. Therefore, *Cornwell* should not be interpreted to nullify the holding in *Glick*.

The majority also cites *Moore v. Holbrook*, 2 F.3d 697 (6th Cir. 1993), for the principle that a violation of the Eighth Amendment will nevertheless occur if "the offending conduct [ ] reflect[s] an 'unnecessary and wanton infliction of pain.'" *Id.* at 700 (citations omitted). Once again, however, *Moore* itself cites *Glick*: "'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."'" *Moore*, 2 F.3d at 700 (quoting *Whitley*, 475 U.S. at 320-21 (quoting *Glick*, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973))).

Unlike the majority I would not reject *Glick* or *Evans*. Both *Glick* and *Evans* analyze excessive force claims under the Eighth Amendment. Both cases have been relied upon by the Supreme Court in *McMillian*. Once again I believe the district court's reasoning and the court's reliance on *Glick*, *Evans*, and *McMillian* is persuasive and that Pelfrey did not state an Eighth Amendment claim.

On the Eighth Amendment claim, therefore, I would affirm the district court's grant of judgment on the pleadings for the defendants.

FILED KENNETH J. MURPHY CLERK
93 FEB 10 AM 11:2 U.S. DISTRICT COURT
SOUTHERN DIST. OHIO EAST. DIV. COLUMBUS

UNITED STATES DISTRICT COURT
Southern District of Ohio

DAVID L. PELFREY

JUDGMENT IN A CIVIL CASE

vs

Case No. C2-92-225

Judge Beckwith
Magistrate Judge Abel

CORRECTION OFFICERS SEAN
CHAMBERS AND LARRY CLOSSER

[] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Opinion and Order filed February 8, 1993 granting the Defendants' motion for judgment on the pleadings, JUDGMENT is entered in favor of Defendants Sean Chambers and Larry Closser.

Date: **February 10, 1993** **Kenneth J. Murphy, Clerk**

_____

By Peg Lambert/Deputy Clerk

FILED KENNETH J. MURPHY CLERK
93 FEB -8 PM 3:07 U.S. DISTRICT COURT
SOUTHERN DIST. OHIO EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID L. PELFREY,	:	
	:	
Plaintiff,	:	Civil Action C-2-92-225
	:	
v.	:	Judge Beckwith
	:	
CORRECTION OFFICERS SEAN CHAMBERS AND LARRY CLOSSER,	:	Magistrate Judge Abel
	:	
Defendants.	:	

OPINION AND ORDER

Plaintiff, David L. Pelfrey, an inmate confined to the London Correctional Camp, brings this action under 42 U.S.C. §1983 alleging that on January 2, 1992, defendant Correctional Officers Sean Chambers and Larry Closser forcibly cut his hair with a knife in violation of the Eighth Amendment prohibition against cruel and unusual punishment. This matter is now before the Court on defendants' October 2, 1992 motion to stay discovery, defendants' October 2, 1992 motion for judgment on the pleadings, defendants' October 21, 1992 motion to clarify docket and to file instanter defendant motion for judgment on the pleadings, plaintiff's October 22, 1992 motion for

injunction, and plaintiff's November 2, 1992 motion for the appointment of counsel.

Motion to Clarify

Due to an apparent error in the docketing information provided to the attorney for the defendants, he was led to believe that the Clerk of Court had not received for filing defendants' October 2, 1992 motion for judgment on the pleadings. See Defendants' Exh. 2 at 3. A review of the case file and docket reveals that the October 2, 1992 motion had in fact been filed and docketed. Accordingly, defendants' October 21, 1992 motion to clarify docket and to file instanter defendant motion for judgment on the pleadings is DENIED as MOOT.

Motion for Appointment of Counsel

Mr. Pelfrey requests that the Court appoint counsel to represent him in this lawsuit.

Under 28 U.S.C. §1915(d):

> The court may request an attorney to represent any [litigant who is proceeding in forma pauperis] unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

As this statute makes clear, "the appointment of counsel in a civil case is, as is the privilege of proceeding in forma pauperis, a matter within the discretion of the court. It is a privilege and not a right." United States v. Madden, 352 F.2d 792, 793 (9th Cir. 1965).

Upon due consideration, the Court finds that plaintiff's cause is not so complex that he requires the aid of appointed counsel. Accordingly, plaintiff's motion for appointment of counsel is DENIED.

The Complaint

The Complaint alleges:

> On January 2, 1992, after returning from my job assignment, I went to the Upstairs Office of the London Correctional Camp, where I reside, to obtain my mail. Correction Officers (and defendants) Chambers and Closser were in the office. I asked Officer Closser for my mail. I was responding to a question from Officer Closser when he started walking around from where he was standing behind the desk. He (Officer Closser) pulled out his knife as he walked towards me. When he got within reach of me, Officer Closser put one hand on my shoulder and the other one on top of my head. I instinctively put my hands on top of my head, and at that time, Officer Chambers pulled his knife out and grabbed my hands, forcing them down to my side. Officer Closser then proceeded to cut my hair with his knife. After cutting off a great portion of my hair, Officer Chambers then let me go, and he (Officer Chambers) stood there grinning and smiling, while Officer Closser was laughing and dropping my hair on the floor. These officers had me scared, intimidated, and threatened.

Complaint ¶IV.

Plaintiff seeks compensatory damages and also seeks a Court order requiring the "defendants to forfeit their jobs as Correctional Officers, unless they undergo treatment for their abusive behavior." Complaint ¶V.

Motion to Dismiss

Defendants have moved under Rule 12(c) of the Federal Rules of Civil Procedure, for dismissal asserting that the above facts, taken as true, fail to state a claim. Rule 12(c) permits a judgment on the pleadings. In considering such a motion, the court must accept all the factual allegations as true. Beal v. Missouri Pacific R.R., 312 U.S. 45, 51 (1941). The motion will be granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law. General Cinema Corp. v. Buena Vista Distributing Co., 681 F.2d 594, 597 (9th Cir. 1982).

Last term, the United States Supreme Court, in Hudson v. McMillian, 501 U.S. ___, 112 S. Ct. 995, 117 L. Ed. 2d 156; 60 U.S.L.W. 4151, 1992 U.S. LEXIS 1372 (February 25, 1992), examined whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury. In Hudson, the Court held "that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in Whitley [v. Albers, 475 U.S. 312 (1986)]: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. 1992 U.S. LEXIS at *10.

The Court also observed that Eighth Amendment claims need to be viewed in context. For example, the Court noted that extreme deprivations are required to make out a

conditions-of-confinement claim "because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society.'" Id. at *14 quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981). The Court also observed that a similar analysis applies to medical needs because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are "serious." Id. citing Estelle v. Gamble, 429 U.S. 97, 103-104 (1976).

However, "[i]n the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." 1992 U.S. LEXIS 1372 at *14-*15. citing Whitley, 475 U.S. at 327. The Court tempered this broad statement observing that "not every malevolent touch by a prison guard gives rise to a federal cause of action." 1992 U.S. LEXIS 1372 at *14 citing Johnson v. Glick, 481 F. 2d 1028, 1033 (2d Cir.) cert denied 404 U.S. 1033 (1973) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights").

While clarifying the standard to be applied by the courts in excessive force cases, the Supreme Court in Hudson left intact the argument raised by defendants here. Defendants contend that this is an assault case which does not implicate Eighth Amendment guarantees because the plaintiff was not being "punished" as that term has been defined in Eighth Amendment jurisprudence.

Punishment is an action by prison guards or a condition of confinement applied to an inmate for a penal or disciplinary purpose and authorized by high level prison

officials. George v. Evans, 620 F.2d 495 (5th Cir. 1980). A spontaneous, isolated assault by a prison guard on an inmate is not punishment within the Eighth Amendment. Id. at 497; Johnson v. Glick, 481 F.2d at 1032 ("[A]lthough a spontaneous attack by a guard is 'cruel' and, we hope, 'unusual,' it does not fit any ordinary concept of 'punishment.'").

Moreover, a state prisoner does not have a protected interest in the length of his hair. Courts have uniformly held that prison grooming regulations are logically related to legitimate security concerns. Scott v. Mississippi Dept. of Corrections, (5th Cir. 1992); Rinehart v. Brewer, 491 F.2d 705, 706 (8th Cir. 1974). "The federal courts will not undertake the duty and responsibility of supervising the length and style of prison inmates hair." Hutchinson v. Anderson, 366 F. Supp. 795, 796 (E.D. Okla 1973).

Here, the Complaint does not allege any penalogical purpose behind the acts of defendants. Thus, based on the aforementioned authorities, the Court finds that the conduct alleged herein does not violate a constitutional guarantee. The Court expresses no opinion on the question of whether the conduct alleged in the Complaint states a cause of action under state law.

Accordingly, the Court must conclude that this action be dismissed. Defendants' motion to clarify the docket is DENIED. Plaintiff's motion for appointment of counsel is DENIED. Defendants' motion for judgment on the pleadings is GRANTED. All other pending motions are DENIED as MOOT. The Clerk of Court is DIRECTED to enter JUDGMENT for defendants Sean Chambers and Larry Closser.

IT IS SO ORDERED.

Sandra S. Beckwith
United States District Judge

MAY 26 PAGE 2

94-1652

Supreme Court, U.S.
FILED
MAY 10 1995
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1994

SEAN CHAMBERS

and

LARRY CLOSSER

Petitioners,

v.

DAVID L. PELFREY

Respondent.

Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

MOTION OF RESPONDENT DAVID L. PELFREY
TO PROCEED IN FORMA PAUPERIS

The Respondent, David L. Pelfrey, asks leave to file the attached Brief in Opposition, without prepayment of costs and to proceed in forma pauperis.

Respondent is presently incarcerated. He has been granted leave to proceed in forma pauperis in both the United States District Court and the Court of Appeals.

The Affidavit of David L. Pelfrey, Respondent, in support of this motion is attached hereto.

ALPHONSE A. GERHARDSTEIN
Counsel of Record
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

18 pp

MAY-11 95 13:08 FROM:LAW OFFICES 1-513-345-5543 TO:202 PAGE:02

In The
Supreme Court of the United States
October Term, 1994

SEAN CHAMBERS

and

LARRY CLOSSER

Petitioners,

v.

DAVID L. PELFREY

Respondent.

Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

AFFIDAVIT OF DAVID L. PELFREY

STATE OF OHIO)
)SS:
COUNTY OF FRANKLIN)

I, Respondent David L. Pelfrey, being duly sworn, do hereby depose and state:

1. I am presently incarcerated at the Correctional Reception Center, #308-851, P.O. Box 300, Orient, Ohio 43146. I have been incarcerated since April 13, 1995.

2. I am without funds to pay the fees and costs for opposition to the motion for certiorari that has been filed in the above-entitled case.

3. In 1994, I earned a total of $1,317 from employment. I earned no money from rent payments, interest, dividends pensions, annuities, life insurance payments, gifts, inheritances or any other source.

MAY-11 95 13:09 FROM:LAW OFFICES 1-513-345-5543 TO:202 PAGE:03

4. I have no money in checking or savings accounts. At present, I have no cash and approximately $75.00 in my prison account.

5. I have no interest in real estate, stocks, bonds, notes, automobiles or other valuable property. My possessions are limited to clothing and a few personal items.

6. I receive no financial support from family members, and I have no dependents.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

David L. Pelfrey

David L. Pelfrey

Sworn to and subscribed in my presence this 3 day of May, 1995.

Glennadine M Hess

Notary Public

GLENNADINE M. HESS
Notary Public, State of Ohio
My Commission Expires July 7, 1996
Recorded in Pickaway County

MAY-11 95 13:09 FROM:LAW OFFICES 1-513-345-5543 TO:202 PAGE:04

94-1652

MAY 26 PAGE 2

In The
Supreme Court of the United States
October Term, 1994

SEAN CHAMBERS

and

LARRY CLOSSER

Petitioners,

v.

DAVID L. PELFREY

Respondent.

Petition For Writ Of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF RESPONDENT DAVID L. PELFREY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALPHONSE A. GERHARDSTEIN
Counsel of Record
SARAH W. POSTON
Attorney for Respondent
LAUFMAN, RAUH & GERHARDSTEIN
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

QUESTION PRESENTED FOR REVIEW

Proposed by Petitioner:

1. Whether an isolated and unauthorized assault by a guard upon a prison inmate constitutes "punishment" within the meaning of the Eighth Amendment prohibition against cruel and unusual punishment.

Proposed by Respondent David L. Pelfrey:

2. Whether the Eighth Amendment is violated by prison guards who, without provocation, restrain an inmate and then use a knife to menacingly slice the hair from the inmate's head.

OPINIONS BELOW

Respondent adopts the statement of the petitioners.

JURISDICTION

Respondent adopts the statement of the petitioners.

CONSTITUTIONAL PROVISION INVOLVED

Respondent adopts the statement of the petitioners.

I. STATEMENT OF THE CASE

A. Introduction

This case is about an attack by two prison guards on an inmate, David Pelfrey. Petitioners Sean Chambers and Larry Closser, guards at the London Correctional Camp, restrained Mr. Pelfrey and menacingly used a knife to slice the hair from his head. Defendants claim that this ancient form of punishment should no longer be recognized under the Eighth Amendment. The Sixth Circuit Court of Appeals correctly rejected that argument. This case certainly does not deserve Supreme Court review.

B. Statement of Facts

David Pelfrey, a prisoner at the London Correctional Institution (LCI) on January 2, 1992, alleged in his complaint that he was assaulted that day by petitioners Sean Chambers and Larry Closser:

> On January 2, 1992, after returning from my job assignment, I went to the Upstairs Office

> at the London Correctional Camp, where I reside, to obtain my mail. Correction Officers (and Defendants) Chambers and Closser were in the office. I asked Officer Closser for my mail. I was responding to a question from Officer Closser when he started walking around from where he had been standing behind the desk. He (Officer Closser) pulled out his knife as he walked towards me. When he got within reach of me, Officer Closser put one hand on my shoulder and the other one on top of my head. I instinctively put my hands on top of my head, and at that time, Officer Chambers pulled his knife out and grabbed my hands, forcing them down to my side. Officer Closser then proceeded to cut my hair with his knife. After cutting off a great portion of my hair, Officer Chambers then let me go, and he (Officer Chambers) stood there grinning and smiling, while officer Closser was laughing and dropping my hair on the floor. These officers had me scared, intimidated, and threatened.

Pelfrey filed an Informal Grievance following the event. He contacted the Institution Inspector and the Warden. Following an investigation, petitioners were each given four days of administrative leave. Pelfrey v. Chambers, 43 F.3d 1034, 1035 (6th Cir. 1995). Soon thereafter, Pelfrey filed the complaint in this case, requesting damages and injunctive relief.

Petitioners denied all of the factual allegations in Pelfrey's complaint, and alleged that it failed to state a claim. Petitioners moved for judgment on the pleadings, arguing that even if they had cut Pelfrey's hair with a knife without provocation, their actions were not taken with a penological or disciplinary purpose and therefore did not constitute "punishment" under the meaning of the Eighth Amendment.

C. Decisions Below

The District Court granted petitioners' motion, relying upon Johnson v. Glick, 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973) and George v. Evans, 633 F.2d 413 (5th Cir. 1980). The district court held that an unprovoked and unjustified assault by a prison guard does not fall within the meaning of punishment for Eighth Amendment purposes.

The Sixth Circuit Court of Appeals reversed, holding that a prison guard's attack on an inmate states a claim under the Eighth Amendment, regardless of whether the assault is motivated by a penological purpose. The court looked to this Court's decision in Graham v. Connor, 490 U.S. 386, 395 n. 10 (1989), which cited Whitley v. Albers, 475 U.S. 312, 327 (1979). It noted that for incarcerated persons, the Eighth Amendment is "'the primary source of substantive protection. . . in cases . . .where the deliberate use of force is challenged as excessive and unjustified.'" The court then quoted Cornwell v. Dahlberg, 963 F.2d 912 (6th Cir. 1992), in which the Sixth Circuit Court of Appeals held that a post-conviction excessive force claim "is to be brought exclusively under the Eighth Amendment's cruel and unusual punishment clause." Id. at 915, quoted in, Pelfrey, 43 F.3d at 1036-37.

One Circuit Judge dissented from the decision below, finding that this Court had in Hudson v. McMillian, 112 S.Ct. 995 (1992), reserved the question of whether an isolated assault by a prison guard states a claim under the Eighth Amendment.

None of the judges considering the case noted that the assault at issue was a forced cutting of the hair which has long been recognized as a form of punishment in our society and others worldwide.

II. REASONS FOR DENYING THE WRIT

This case does not deserve Supreme Court Review. At issue is the forced cutting of inmate Pelfrey's hair. Such conduct has long been viewed in this society and others as punishment. Further, when viewed as "a spontaneous, isolated assault by a prison guard on an inmate," Pelfrey v. Chambers, No. C-2-92-225 (S.D. Oh. February 8, 1993), Petitioners Appendix A-23, the complaint most certainly describes a violation of the Eighth Amendment.

A. Forced Hair Cutting is Clearly a Form of Punishment

Men and women convicted of witchcraft from Germany to India and beyond have long been subjected to hair cutting as a form of punishment for their crime. Wendy Cooper, Hair, Sex, Society, Symbolism 197-98 (1971). Similarly,

> [d]eprivation of hair was always regarded as a dreadful form of punishment, a superstition that was exploited to the full by penal authorities in the Dutch East Indies who, by threatening to remove the hair of their prisoners, usually managed to secure an immediate confession without recourse to torture.

Man, Myth & Magic 1107 (Richard Cavendish ed., 1995). French collaborators suffered head shavings at the hands of their government for cooperation with the Germans during World War II, and the Irish Republican Army has shaved the heads of

Catholic women who kept company with Protestant or British men. Anthony Synnott, Shame and Glory: A Sociology of Hair, in 38 The British Journal of Sociology 381, 402 (Christopher Badcock & Percy S. Cohen eds., 1987).

In the United States, officials at the Cook County Jail cut the hair of members of the 'Chicago Seven' in 1970. Student protesters in a Michigan jail the same year were forced to have their hair cut while they awaited release on bond. These and other haircuts imposed on incarcerated individuals were seen as reflecting public "desire to humiliate defendants for being unconventional and disrespectful to society." Raymond Firth, Symbols Public and Private 282 (1973).

Slicing respondent's hair from his head in this case was done to humiliate and threaten him. There is no allegation that it was necessary for security purposes. Rather, like the head shavings and hair cuts traditionally administered to witches, political enemies and prisoners in our society and others, the senseless and malicious conduct alleged in this case is certainly an act of punishment.

B. Eight Recent Decisions From This Court Have Sufficiently Defined the Scope Of Eighth Amendment Prohibitions In The Prison Setting

Including Estelle v. Gamble, 429 U.S. 97 (1976), this Court has recently decided eight cases specifically defining the scope of the Eighth Amendment's protection against cruel and unusual punishment, all but one of them in the prison context. The Court has decided four of these cases in the last

four years.

The Eighth Amendment, as interpreted by this Court, prohibits much more than "physically barbarous punishments." Id. at 102 (holding that deliberate indifference to a prisoner's serious medical needs constituted cruel and unusual punishment under the Eighth Amendment). The "'unnecessary and wanton infliction of pain' [on prisoners]. . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Ingraham v. Wright, 430 U.S. 651 (1977) (quoting Estelle). In Hutto v. Finney, 437 U.S. 678 (1978) this Court held that inhumane prison conditions, including "unprofessional behavior" by prison staff, violated the Eighth Amendment. See also, Rhodes v. Chapman, 452 U.S. 337 (1981) (conditions other than those in Estelle and Hutto may violate the Eighth Amendment if they are "cruel and unusual" under contemporary standards).

Recent decisions by this Court have focussed particularly on the significance of prison guards' mental state in their potential liability under the Eighth Amendment. Wilson v. Seiter, 111 S.Ct. 2321 (1991) (requiring a showing of deliberate indifference on part of prison officials in order to show that prison conditions constituted cruel and unusual punishment); Hudson, 112 S.Ct. at 1000 (1992) (prisoner with minor injuries stated a claim for excessive force in violation of the Eighth Amendment where "prison officials maliciously and sadistically use force to cause harm. . . whether or not

significant injury is present"); Helling v. McKinney, 113 S.Ct. 2475 (1993) (prison guards' deliberate indifference must be determined "in light of the prison authorities' current attitudes and conduct"); Farmer v. Brennan, 114 S.Ct. 1970 (1994) (prison officials showed deliberate indifference where they knew that inmates faced a substantial risk of serious harm, and they failed to act reasonably to prevent it). These recent decisions have not yet been fully explored by the appellate courts. No new Eighth Amendment decisions are needed to further explain them. This Court should simply allow the law to develop further in this area before accepting another case.

Petitioners and the dissenting panel member in the Court of Appeals suggest that the Eighth Amendment does not reach random and unauthorized acts by individual guards. They rely on Johnson v. Glick, 481 F.2d 1028, and George v. Evans, 633 F.2d 413. Those decisions are inapposite for two reasons. First, the distinction petitioners attempt to create between spontaneous, unauthorized conduct by government officials, and authorized conduct, has been specifically rejected by this Court in similar contexts as a way to determine whether a constitutional right has been violated. See, e.g., Monroe v. Pape, 365 U.S. 167, 186 (1961) (claim stated under Fourth Amendment against city police officers who purportedly violated their own department rules while conducting an allegedly unconstitutional search). See also Tennessee v. Garner, 471

U.S. 1 (1985) (police officer's acts consistent with local law nonetheless violated Fourth Amendment). Second, this Court has disapproved the application of multiple constitutional Amendments in analyzing a government official's allegedly unconstitutional act. See, e.g., Graham v. Connor, 490 U.S. 386, 394 (excessive force claim against police officers who made investigative stop must be reviewed only under Fourth Amendment); Albright v. Oliver, 114 S.Ct. 807 (1994) (malicious prosecution claim is to be analyzed exclusively under Fourth Amendment). Thus, by relying on multiple constitutional theories for a single act, Glick and Evans no longer express the proper constitutional standard. The panel was correct to reject arguments based upon those cases.

C. The Facts Alleged In Respondent's Complaint Place His Claim Squarely Within the Scope of The Eighth Amendment As Interpreted By This Court And The Sixth Circuit Court Of Appeals

The decisions in this Court have left no question as to whether random acts of cruelty by prison guards against prisoners are cognizable under the Eighth Amendment. As explained above, the Court has recognized repeatedly that the Eighth Amendment prohibits more than official acts intended to punish. See Estelle (official actions "incompatible with the evolving standards of decency that mark the progress of a maturing society" violate Eighth Amendment). In Wilson, the Court discussed the meaning of "punishment" in the Eighth Amendment context, as explained by petitioners. But the Court did not exclude conduct outside this definition from the reach

of the Eighth Amendment. On the contrary, Wilson clearly recognized the validity of Eighth Amendment claims "based on official conduct that does not purport to be the penalty formally imposed for a crime," expanding the deliberate indifference standard from Estelle to all such claims. Id. at 2326. Three years ago, the Court held that when "prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." Hudson, 112 S.Ct. at 1000. The Hudson Court made no exception for excessive force claims involving unauthorized beatings and other uses of force by prison officials; it stated merely that it would not address the respondents' attempt to distinguish this kind of claim from the rest of those cognizable under the Eighth Amendment. Id. at 1001.

Thus the Court of Appeals' decision in this case, that the Eighth Amendment protects prisoners from the isolated assaults formerly analyzed by other courts under the Fourteenth Amendment, is fully consistent with Supreme Court precedent. It also follows precedent set in the Sixth Circuit. In Cornwell v. Dahlberg, 963 F.2d 912, 918 (6th Cir. 1992), the Sixth Circuit followed Graham to hold that a prisoner forced to lie face down in the mud on a 40 degree day stated a claim for excessive force under the Eighth Amendment only.

That a haircut forced by knife and administered by a laughing prison guard is a sufficiently malicious and sadistic act to give rise to a claim under the Eighth Amendment is

thoroughly supported by the Sixth Circuit's previous decisions. Parrish v. Johnson, 800 F.2d 600 (6th Cir. 1986) (prison guard who waived knife in front of a paraplegic prisoner's face once for no reason and a second time to extort potato chips and cookies violated the Eighth Amendment); Moore v. Holbrook, 2 F.3d 697 (6th Cir. 1993) (wantonness of guards' three beatings was disputed fact issue preventing summary judgment). See also Franklin v. Aycock, 795 F.2d 1253 (6th Cir. 1986), citing Glick, 481 F.2d 1028 ("unjustified striking, beating, or infliction of bodily harm upon a prisoner by . . . a correctional officer gives rise to liability under 42 U.S.C. 1983").

D. There Is No Conflict Among The Circuits

The Supreme Court's decision in Graham v. Connor, 490 U.S. 386, has effectively resolved any preexisting conflict among the Circuit Courts of Appeals as to whether the Fourth, Fourteenth or Eighth Amendment protects persons following conviction from unauthorized uses of force. The Sixth and Ninth Circuit decisions following Graham have correctly decided that excessive force claims during arrests are analyzed under the Fourth Amendment while excessive force claims after conviction are to be analyzed under the Eighth Amendment. Cornwell v. Dahlberg, 963 F.2d 912 (6th Cir. 1992); Hirano v. Kakuda, Nos. 92-15076, 92-15091, 92-15854, 92-16398, 1994 U.S. App. LEXIS 8130 at *5 (9th Cir. Jan. 18, 1994) (copies provided by petitioners) (squarely rejecting a prison guard's argument

in reliance on Glick that as an "isolated attack" his conduct toward the plaintiff prisoner should not be within the reach of the Eighth Amendment).[1] The District Court for the District of Hawaii also followed this reasoning. Freitas v. Stone, 818 F.Supp. 1333 (D.Hawaii 1993). See also Rodriguez v. Murphy, No 91-CV-0650E(F), 1994 U.S. Dist. LEXIS 19107 at *13 (W.D.N.Y., December 30, 1994) (analyzing "an isolated assault" under the Eighth Amendment). Duckworth v. Franzen, 780 F.2d 645 (7th Cir. 1985), was decided before Graham, and it did not involve an excessive force claim.[2] Davis v. Locke, 936 F.2d 1208, 1212 (11th Cir. 1991), simply fails to follow Graham.

E. The Facts Of This Case Make It Inappropriate For Review

Petitioners in this case are two prison guards who laughed and grinned while one of them sliced away an inmate's hair with a knife. This use of force is exactly the malicious and sadistic, unjustified behavior by government officials that falls within the scope of the Eighth Amendment. No minimum degree of harm is required to state a claim under the Eighth Amendment. Hudson, 112 S.Ct. at 1000. Rather, the "core judicial inquiry" in such a case is "whether force was applied in a good-faith effort to maintain or restore discipline, or

---

[1] The court's reference to the Supreme Court's failure to address this issue in Hudson by no means places the Ninth Circuit's holding in conflict with other circuits.

[2] The court's notation that a guard's beating of a prisoner "to supplement [his] official punishment" would be "punishment" under the Eighth Amendment was made to illustrate the level of intent required to state a claim of deliberate indifference. Id. at 652.

maliciously and sadistically to cause harm." Id. at 998-999.

Prison guards have a duty to ensure "reasonable safety" to prison inmates. Helling, 113 S.Ct. 2475, 2481 (1993), cited by, Farmer, 114 S.Ct. at 1983. The kind of wanton cruelty displayed by petitioners in this case must not be removed from the reach of Eighth Amendment protection. While it is true that "[n]ot every push or shove. . . violates a prisoner's constitutional rights," Hudson 112 S.Ct. at 1000, this is not a case of an inadvertently rough push or shove. This is an example of precisely the "unnecessary and wanton infliction of pain," Ingraham, 430 U.S. at 651, against which the Constitution must protect for those who live each day at the mercy of government officials. Prison guards' discretion and behavior determine the constitutionality of inmates' confinement every minute of the day. See Hudson, 112 S.Ct. at 999, quoting Whitley, 475 U.S. at 321-22 ("'Prison administrators. . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline . . .'"). To remove constitutional protection from malicious behavior by prison guards in this context in which they have such a high degree of discretion, simply because the conduct is characterized as "personal" rather than a matter of policy, would be anomalous at best. In the words of the Court of Appeals, the conclusion urged by petitioners:

> would ignore the power arrangements that exist within the prison environment and lead

> to the anomalous result in which a prisoner who is assaulted after having provoked a guard can state a cognizable claim for a constitutional violation while his cellmate who is assaulted for absolutely no reason is afforded only that relief permitted by state law. Such a result is devoid of all logic and flies in the face of [the Court of Appeals'] previous statement that "the motivation of an assault" is relevant to the question of "whether the measure taken inflicted unnecessary and wanton pain." Moore v. Holbrook, 2 F.3d 697, 700 (6th Cir. 1993).

Pelfrey, 43 F.3d at 1037.

To deny constitutional protection against this kind of conduct would be entirely inconsistent with the Court's consistent recognition of governmental responsibility toward those whom it confines. See Deshaney v. Winnebago County Dep't of Social Servs, 489 U.S. 189 (1989), citing Estelle, 429 U.S. 97 (government's duty to incarcerated); Robinson v. California, 370 U.S. 660, (1962) (same); Youngberg v. Romeo, 457 U.S. 307 (1982) (duty of care to involuntarily committed). The Eighth Amendment embodies "an intention to limit the power of those entrusted with the criminal-law function of government," Ingraham v. Wright, 430 U.S. 651, 664 (1977). To remove its protection in an instance of brazen conduct such as the intimidating slashing of hair in this case would contradict a long history of Eighth Amendment jurisprudence and deny prisoners the only constitutional protection they have against the random abuse of power by the government officials who control their confinement.

IV. CONCLUSION

The Petition for Writ of Certiorari should be denied. The decision of the Sixth Circuit Court of Appeals was correct. Judgment on the pleadings was properly reversed, and the case properly remanded to the district court.

Respectfully submitted,

ALPHONSE A. GERHARDSTEIN
Counsel of Record
SARAH W. POSTON
Attorney for Respondent
1409 Enquirer Building
617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

Attorneys for Respondent

(3)

Supreme Court, U.S.
FILED
MAY 22 1995

No. 94-1652

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Sean Chambers,
Larry Closser,

Petitioners,

v.

David L. Pelfrey,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BETTY D. MONTGOMERY
Ohio Attorney General

SIMON B. KARAS
Counsel of Record
Deputy Chief Counsel
JOHN D. STUBER
Assistant Attorney General
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 644-5401

Attorneys for Petitioners

7pp

QUESTION PRESENTED FOR REVIEW

WHETHER AN ISOLATED AND UNAUTHORIZED ASSAULT BY A GUARD UPON A PRISON INMATE CONSTITUTES "PUNISHMENT" WITHIN THE MEANING OF THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

REPLY ARGUMENT 1

CONCLUSION 3

TABLE OF AUTHORITIES

Page(s)

Davis v. Locke,
936 F.2d 1208 (11th Cir. 1991) 2, 3

Hudson v. McMillian,
503 U.S. ___, 112 S.Ct. 995 (1992) 3

Hutchinson v. Anderson,
366 F. Supp. 795 (E.D. Okla. 1973) 2

Johnson v. Glick, 481 F.2d 1028,
(2nd Cir. 1973), *cert. denied sub. nom.*,
414 U.S. 1033 (1973) 1

Rinehart v. Brewer,
491 F.2d 705 (8th Cir. 1974) 2

Scott v. Mississippi Dept. of Corrections,
961 F.2d 77 (5th Cir. 1992) 2

Wilson v. Seiter,
501 U.S. ___, 111 S.Ct. 2321, (1992) 1

REPLY ARGUMENT

This case requires Supreme Court review in order to resolve the issue of whether an isolated and unauthorized assault by a prison guard on a prison inmate is "punishment" under the Eighth Amendment. Although Respondent never asserts that the assault was anything but an isolated and unauthorized act, he nonetheless argues that the cutting of his hair constituted punishment. Respondent supports his argument by noting that various cultures throughout history have viewed certain types of hair cutting as punishment. Respondent's argument is neither authoritative nor persuasive.

Respondent may well be correct when he states that in Germany and India the cutting of one's hair after being convicted of witchcraft served as a severe form of punishment. It does not follow, however, that the cutting of a prisoner's hair is in and of itself a form of punishment. In order for the cutting of hair to be punishment for Eighth Amendment purposes it must be "deliberately administered for a penal or disciplinary purpose." *Wilson v. Seiter*, 501 U.S. ___, 111 S.Ct. 2321, 2325 (1992), *quoting Johnson v. Glick*, 481 F.2d 1028, 1032 (2nd Cir. 1973), *cert. denied sub. nom.*, 414 U.S. 1033 (1973). Nowhere in the record is it alleged that there was any such purpose in the instant case.

Upon close examination it becomes apparent that in every example supplied by Respondent, the cutting of a prisoner's hair was an official response for the purpose of chastising or rehabilitating the offender. Respondent fails to consider the context in which the act of cutting a prisoner's hair is done. The official act of cutting a prisoner's hair to which religious or political significance is placed is wholly different from the act of cutting a prisoner's hair out of personal animus.

Even if Respondent were able to establish that the cutting of his hair was for some disciplinary or penal purposes his claim must still fail. Courts have uniformity held that when it comes to issues of cutting a prisoner's hair, they will defer to the discretion of the prison administrators. *Scott v. Mississippi Dept. of Corrections*, 961 F.2d 77 (5th Cir. 1992); *Rinehart v. Brewer*, 491 F.2d 705 (8th Cir. 1974). As one court stated:

> A *fortiori* it may be said that the federal courts will not undertake the duty and responsibility of supervising the length and style of prison inmates hair. The supervision of the internal affairs of correctional institutions including the discipline and care of inmates rests with the prison administrators and is not ordinarily subject to judicial review.

Hutchinson v. Anderson, 366 F. Supp. 795 (E.D. Okla. 1973).

Consequently, if the cutting of Respondent's hair by Petitioners is considered to be an official act, absent compelling circumstances, the federal courts will not interfere. Petitioner, of course, in no way believes that the cutting of Respondent's hair was anything but an isolated and unauthorized act. And in the context of this case, such alleged cutting of hair was entirely de minimis.

Respondent further argues that this case does not merit Supreme Court Review because there is no conflict between the Circuits on the issue of whether an isolated and unauthorized assault constitutes punishment. In his reply, however, Respondent fails to consider the Eleventh Circuit decision in *Davis v. Locke*, 936 F.2d 1208 (11th Cir. 1991).

The *Davis* decision, by holding that an isolated and unauthorized assault by a prison guard on a prison inmate is not punishment is in direct conflict with both the Sixth and Ninth Circuits. This Court has itself recognized this unsettled question in *Hudson v. McMillian*, 503 U.S. ___, 112 S.Ct. 995 (1992). Therefore, review by this Court is critical to guide the lower court in future cases of this type.

CONCLUSION

Wherefore, for the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

BETTY D. MONTGOMERY
Ohio Attorney General

SIMON B. KARAS
Counsel of Record
Deputy Chief Counsel
JOHN D. STUBER
Assistant Attorney General
State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 644-5401

Attorneys for Petitioners

May 19, 1995